

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY FRENCH)	
Claimant)	
VS.)	
)	
EXIDE TECHNOLOGIES)	Docket No. 1,015,036
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the January 19, 2005 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant's benefits were terminated after the Administrative Law Judge (ALJ) granted respondent's application to terminate benefits, finding that claimant was less than forthright and credible, determining that claimant had failed to prove he suffered personal injury by accident arising out of and in the course of his employment on January 11, 2004.

ISSUES

The specific issue raised by claimant in his Request For Review, filed January 21, 2005, is as follows:

"1. Compensability."¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed.

¹ Claimant's Request For Review at 1 (filed Jan. 21, 2005).

Claimant alleges accidental injury occurring on January 11, 2004, when, while working as a maintenance technician for respondent, he moved a pump on a table and felt his back snap. He was taken to the emergency room by his superintendent, Craig Derr, where he was provided pain medication. The pain claimant experienced was at the belt line on the right side with leg pain.

Claimant, thereafter, went to the emergency room on several occasions for pain medications and came under the treatment of numerous doctors, including Alan K. Wedel, M.D., who last examined claimant approximately one week before the March 15, 2004 deposition of claimant.

As a result of the April 9, 2004 preliminary hearing, claimant was ordered to receive temporary total disability compensation and medical treatment at the expense of respondent.

Claimant was referred to the Salina Clinic, where he underwent treatment with David C. Hanson, M.D. Claimant underwent an MRI examination on January 13, 2004, which was read by radiologist Jeffery Sparacino, D.O., as indicating advanced degenerative disc disease with bilateral neural foraminal narrowing at L4-5, mild central spinal stenosis and an annular tear, with grade I spondylolisthesis at L5-S1, with mild subluxation of L5, with significant neural foraminal and lateral recess encroachment. Respondent filed its motion to terminate benefits, the hearing occurring on December 15, 2004. At that time, the ALJ suspended claimant's receipt of preliminary benefits pending the receipt of C. Reiff Brown, M.D.'s deposition testimony. Upon receiving the testimony, the ALJ determined that claimant's benefits should cease.

The justification for the ALJ's determination to cease benefits stems from claimant's preexisting history of problems. Claimant has a long history of back difficulties, including multiple trips to chiropractors for treatment over a two-year period, with additional treatment provided by John M. Shetlar, D.O., and other physicians at the StatCare - Family Minor Emergency Center (StatCare) in Salina, Kansas. Claimant was seen at StatCare on several occasions in December 2003, with significant back pain. A StatCare physician, Dr. Grant, had claimant undergo an MRI on January 8, 2004, which displayed discogenic disease at L4-5 and L5-S1, with minor bulging.

When radiologist Jeffery Sparacino, D.O., compared the MRI scan of January 8, 2004, to that of January 13, 2004, he determined that there had been no significant change between the times of the two MRIs.

Claimant's history is also significant in that he suffered an injury to his low back while installing a sink at home shortly before his December 10, 2003 examination at StatCare. Claimant advised them he had congenital back problems at the time. Claimant

was examined at StatCare on December 15, 2003, with continued back pain and, at that time, a history of migraine headaches.

Claimant was next examined on December 20, 2003, at which time he reported a slip on some ice, which increased his back pain. He continued with low back pain on December 26, 2003, although he denied leg pain.

On January 2, 2004, claimant was complaining of a headache, a sore throat and coughing. At that time, he was diagnosed with bronchitis. Claimant discussed with the doctor the possibility of an MRI for his back, which was performed on January 8, 2004. At the December visits, claimant was placed upon significant pain medication for his low back, including Vicoprofen and Flexeril (a muscle relaxant). Claimant was later placed on Hydrocodone for pain. Medical records indicated that claimant, rather than taking the medication as prescribed, was doubling up on medication, taking it twice as often as was prescribed. Additionally, there were records in evidence discussing claimant's abuse of narcotic medication and the fact that health care providers were withdrawing their treatment of claimant due to his narcotic abuse.

Claimant was referred for an examination to Paul S. Stein, M.D., a neurological surgeon, on May 12, 2004. After examining claimant and reviewing numerous medical records, Dr. Stein determined that the accident on January 11, 2004, may have temporarily aggravated claimant's preexisting low back problems, but Dr. Stein was unable to say within a reasonable degree of medical probability that claimant permanently aggravated his condition from that injury. Dr. Stein testified that claimant was less than candid with him, providing an inaccurate history of his preexisting problems.

Claimant's testimony is also inaccurate, as at his deposition, held on March 15, 2004, he denied any events or accidents before January 11, 2004, leading to difficulties with his back. His discussion regarding his chiropractic treatment with Dr. Rod Hancock indicated he had had eight to ten visits over approximately one and a half years before, but denied seeing Dr. Hancock for any specific accidents.

Claimant's records, when reviewed by C. Reiff Brown, M.D., an orthopedic surgeon, who examined claimant on August 10, 2004, at the request of his attorney, indicated claimant had undergone twenty-one chiropractic visits between September 11, 2001, and January 16, 2002. Claimant underwent three additional visits between October 14, 2002, and November 22, 2002, with a fourth visit on April 16, 2003. Dr. Brown was not advised of many of these chiropractic visits. He testified that that information was not consistent with the history claimant had provided him.

Dr. Brown also testified he was unable to say within a reasonable degree of medical certainty the effect the December 2003 event, with claimant installing a sink at home, may have had on his back, because the history provided to him by claimant was incomplete.

He acknowledged that whether claimant suffered an aggravation of his preexisting condition from the January 11, 2004 injury depended to a great deal upon claimant's credibility. He acknowledged the MRIs, done both shortly before and shortly after claimant's alleged January 11, 2004 injury, indicated practically identical results. He felt a traumatic event significant enough to herniate a disc would have shown up on the MRI.

Likewise, Dr. Stein testified claimant was less than honest with him during the examination, stating at one point that he felt claimant was trying to mislead him. As noted above, Dr. Stein was unable to say within a reasonable degree of medical certainty whether the January 11, 2004 event aggravated claimant's condition on a permanent basis or was merely a temporary exacerbation of the condition.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.² In this instance, claimant's testimony and the history provided by claimant to the various examining and treating physicians have been seriously called into question by medical reports of various doctors and by claimant's own testimony. The ALJ had the opportunity to view claimant's live testimony at the preliminary hearing of April 9, 2004. After reviewing claimant's testimony and the medical evidence in this matter, the ALJ determined that claimant was less than forthright with the examining physicians and his credibility has been "undermined and called into question." The Board generally gives some deference to an administrative law judge's ability to determine credibility when dealing with the live witness testimony presented to that administrative law judge. In this instance, the Board finds the determination by the ALJ, that claimant has been less than credible, to be supported by the record and affirms the ALJ's determination that benefits associated with the January 11, 2004 alleged accidental injury should be terminated.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated January 19, 2005, terminating claimant's benefits, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant

² K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director